

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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JIM COLLINS,  
*Plaintiff/Appellant,*

*v.*

JANIS C. GALLEGO AND ARIZONA BOARD OF REGENTS,  
*Defendants/Appellees.*

No. 2 CA-CV 2019-0083  
Filed July 8, 2020

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).*

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Appeal from the Superior Court in Pima County  
No. C20181535  
The Honorable Brenden J. Griffin, Judge

**AFFIRMED**

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COUNSEL

Jim Collins, Tucson  
*In Propria Persona*

Mark Brnovich, Arizona Attorney General  
By Jason D. Corley, Assistant Attorney General, Tucson  
*Counsel for Defendants/Appellees*

COLLINS v. GALLEGO  
Decision of the Court

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**MEMORANDUM DECISION**

Judge Espinosa authored the decision of the Court, in which Judge Eckerstrom and Judge Brearcliffe concurred.

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ESPINOSA, Judge:

¶1 Jim Collins appeals from the trial court's order dismissing his second amended complaint against defendants Janis Gallego and the Arizona Board of Regents. For the following reasons, we affirm.

**Factual and Procedural Background**

¶2 At all relevant times, Collins was a graduate student at the University of Arizona and a member of the Graduate and Professional Student Council (GPSC). Janis Gallego was employed by the university as a staff Student Legal Services advisor. In March 2017, Gallego attended a GPSC meeting on the university campus in which Collins and other GPSC members were involved in a political dispute. Collins asked Gallego to answer questions about an advisory opinion the GPSC "Supreme Court" had issued concerning an upcoming election and was unhappy with Gallego's response. After a heated exchange, police were called, Gallego made statements to them, and Collins was arrested for disorderly conduct. He was eventually acquitted of the charge.

¶3 A year later, Collins sued Gallego and the Arizona Board of Regents (ABOR) for negligence, libel, slander, intentional infliction of emotional distress (IIED), "civil conspiracy," and "negligence in the alternative." All of Collins's causes of action were grounded on his allegations that Gallego had made false reports to law enforcement and "other persons" accusing him of criminal acts, which had resulted in his arrest.<sup>1</sup>

¶4 After ABOR and Gallego filed a motion to dismiss for failure to state a claim, Collins filed his first amended complaint, in which he alleged the same causes as in his initial complaint and added claims for "breach of fiduciary duty, defalcation, malpractice, negligent hiring

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<sup>1</sup>Collins also sued two of his fellow graduate students, but shortly after filing the complaint, he voluntarily dismissed them from the suit.

COLLINS v. GALLEGO  
Decision of the Court

training supervision, [and] negligence” related to Gallego’s employment with the university. ABOR and Gallego filed a renewed motion to dismiss, which the trial court granted without prejudice, reasoning that Gallego’s statements to police were privileged and therefore could not be the basis for many of Collins’s claims. The court further found Collins’s “breach of fiduciary duty, defalcation, malpractice, negligent hiring, [and] training supervision claims” did not allege necessary elements and failed to state a claim.

¶5 Collins thereafter filed a second amended complaint alleging the same claims but adding supporting facts to his “breach of fiduciary duty” claim. ABOR and Gallego again moved to dismiss, arguing (1) Collins’s action was barred by A.R.S. § 12-821.01(A) because he had failed to serve a required notice of claim on Gallego, (2) Collins failed to state a claim for breach of fiduciary duty because Gallego owed no fiduciary duties to him, (3) Collins’s legal malpractice claim failed to allege an attorney-client relationship between Gallego and Collins, and (4) because Collins failed to state any tort claim against Gallego, there could be no claim against ABOR for negligent hiring, training, and supervision. The trial court once again dismissed, finding Collins had failed to serve Gallego with a notice of claim, had not demonstrated she had acted in her individual capacity, and adopting the additional grounds in the motion to dismiss. After a final judgment was entered, Collins brought this appeal.

**Discussion**

¶6 Collins contends the trial court erred in dismissing his second amended complaint. We review a court’s ruling on a motion to dismiss de novo. *Coleman v. City of Mesa*, 230 Ariz. 352, ¶¶ 7-8 (2012). In doing so, we look only to the complaint, assuming the truth of all “well-pled factual allegations” and drawing all reasonable inferences therefrom. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, ¶ 7 (2008). But we will uphold dismissal “if the plaintiff[] would not be entitled to relief under any facts susceptible of proof in the statement of the claim.” *Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346 (1996).

**Failure to Comply with Notice-of-Claim Statute**

¶7 In Arizona, a plaintiff must serve a notice of claim on a public employee within 180 days of the action accruing, stating the basis of liability, an amount for which the claim can be settled, and the facts supporting that amount. § 12-821.01(A). Collins essentially admitted

COLLINS v. GALLEGO  
Decision of the Court

below that he did not serve Gallego with a notice of claim,<sup>2</sup> but maintained she had acted outside the scope of her employment. The trial court, however, found that Collins's arguments lacked factual support. Collins contends that conclusion was erroneous because Gallego's actions in reporting Collins to the police "occurred outside of her work hours," and were neither related to her job duties nor "incidental to those duties." Although he concedes those facts were "not specifically set forth in the Second Amended Complaint," he argues they "seem obvious."

¶8 Collins's second amended complaint supports the trial court's determination that Gallego was a public employee acting in the scope of her employment. Collins repeatedly alleged "[a]t all relevant times herein, . . . Gallego was acting within the scope of and in furtherance of her employment by the University of Arizona/ABOR." Moreover, he specifically alleged Gallego attended the meeting as a faculty advisor and was there "to answer questions about the GPSC Supreme Court advisory opinion." And the statements Gallego made to responding police officers were about events that transpired during the meeting. Finally, in his appellate brief Collins cites nothing to support his argument that Gallego was acting in an individual capacity.<sup>3</sup>

¶9 Collins also argues that Gallego "waived her notice of claim defense by failing to assert it at the earliest possible time, and by actively litigating the matter for six months." But Collins failed to make this argument in the trial court. In his response to the motion to dismiss his second amended complaint, he only asserted that he had complied with the notice-of-claim statute. Nor did he raise any waiver claim at the hearing on the motion to dismiss. Appellate courts do not generally consider

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<sup>2</sup>Collins advised the trial court that he attempted to serve Gallego, but was unable to "find the process server who served [her]" to confirm that. He also suggested he had served her by mail but himself questioned the validity of such, and the court informed him the notice was required to be formally served.

<sup>3</sup>To the extent Collins argues the trial court should have permitted him to file a third amended complaint to add additional facts, we note that he only requested leave to amend as an alternative response to the defendants' motion to dismiss. And in any event, he has not demonstrated the trial court abused its discretion. See *Swenson v. County of Pinal*, 243 Ariz. 122, ¶ 21 (App. 2017).

COLLINS v. GALLEGO  
Decision of the Court

arguments raised for the first time on appeal. *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 503 (1987); *Conner v. El Paso Nat. Gas Co.*, 123 Ariz. 291, 293 (App. 1979). And Collins provides no pertinent authority that the notice-of-claim defense must be raised “at the earliest possible time.”<sup>4</sup> Accordingly, we find this issue waived and do not address it further.

**Failure to State a Claim**

¶10 Finally, even assuming either Collins had properly served Gallego with the notice of claim or she had acted in her individual, rather than public, capacity, Collins’s second amended complaint was properly dismissed for failing to state a claim upon which relief could be granted. See Ariz. R. Civ. P. 12(b)(6). All of Collins’s claims stemmed from Gallego’s statements to police, and Collins contends the trial court improperly dismissed his negligence and IIED claims against her based on an erroneous application of privilege.<sup>5</sup> Gallego’s allegedly tortious conduct was her making “demonstrably false” statements seeking “to paint herself as the ‘victim’ of a ‘crime’ by pressing criminal charges” against Collins, of which

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<sup>4</sup>Although the notice-of-claim defense is subject to waiver if a party actively litigates the claim without raising the defense and “seek[ing] prompt resolution of it,” *Ponce v. Parker Fire Dist.*, 234 Ariz. 380, ¶ 11 (App. 2014), Gallego could not be said to have “actively litigated” the case here, where she only filed motions to dismiss in response to Collins’s amended complaints, see *Jones v. Cochise County*, 218 Ariz. 372, ¶¶ 27-29 (App. 2008) (finding active litigation where party “did more than merely respond to the complaint or discovery requests” but also subpoenaed and deposed witnesses and conducted other discovery); *Ponce*, 234 Ariz. 380, ¶¶ 10, 13 (finding waiver where party participated in disclosure, discovery, and ten depositions); *City of Phoenix v. Fields*, 219 Ariz. 568, ¶ 31 (2009) (active litigation where defendant “engaged in extensive briefing,” filed motions for summary judgment, engaged in discovery, and made disclosures without raising the defense).

<sup>5</sup> The trial court also dismissed Collins’s libel, slander, civil conspiracy, breach of fiduciary duty, and malpractice claims against Gallego, and his negligent hiring training and supervision, and negligence claims against ABOR, which he does not appear to challenge. Accordingly, any argument related to these claims is waived. See *Sholes v. Fernando*, 228 Ariz. 455, n.1 (App. 2011) (“failure to develop and support argument waives issue on appeal”); see also Ariz. R. Civ. App. P. 13(a)(7).

COLLINS v. GALLEGO  
Decision of the Court

he was eventually acquitted. As to negligence, Collins reasoned Gallego's "false reporting" constituted a crime that she had "a duty to not commit," which caused his arrest, permanently and irreparably damaging his reputation. Lastly, Collins's IIED claim alleged that Gallego's false statements were "intentional in nature and intolerable in a civilized society" and "caused [him] severe physical and emotional distress" and injury.

¶11 A party or witness in a judicial proceeding holds an absolute privilege with respect to statements that relate to, bear on, or otherwise are connected to the proceeding. *Green Acres Tr. v. London*, 141 Ariz. 609, 613 (1984). When such statements are absolutely privileged, the speaker is immune from civil liability, and courts do not inquire into the declarant's motives or whether the statements were made in good faith. *Ledvina v. Cerasani*, 213 Ariz. 569, ¶ 4 (App. 2006). In *Ledvina*, this court recognized that a putative victim's complaint to law enforcement also falls within that absolute privilege. *Id.* ¶ 14. We reasoned that application of the privilege to such statements serves our constitution's goal of preventing intimidation, harassment, and abuse. *Id.*

¶12 Collins nevertheless maintains that his negligence and IIED claims were improperly dismissed because the privilege applies only in defamation cases. But our holding in *Ledvina* was not so narrow. While the claim there sounded in defamation, *see id.* ¶ 14, we did not limit the privilege only to defamatory torts, and earlier cases have applied it more broadly, *see Linder v. Brown & Herrick*, 189 Ariz. 398, 404-06 (App. 1997) (applying litigation privilege to fraud and IIED claims); *Drummond v. Stahl*, 127 Ariz. 122, 125 (App. 1980) (applying absolute litigation privilege to a tortious interference with contract claim). Indeed, the rationale for granting immunity in defamation actions—"to avoid chilling complaints to law enforcement"—applies equally to the negligence and IIED claims Collins brought against Gallego. *See Fappani v. Britton*, 243 Ariz. 306, ¶ 13 (App. 2017); *Ledvina*, 213 Ariz. 569, ¶ 12 ("Only an absolute privilege from civil litigation can adequately promote the compelling public policy of encouraging the free and unhindered communications to law enforcement authorities necessary to facilitate the investigation and prosecution of crimes.").<sup>6</sup>

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<sup>6</sup>We also reject Collins's suggestion that his acquittal of the charges means Gallego was not a victim entitled to assert the privilege against his tort claims. Neither *Ledvina* nor any other case we are aware of has made any distinction between police reports that lead to a conviction and those

COLLINS v. GALLEGO  
Decision of the Court

**Disposition**

¶13 For the foregoing reasons, the trial court's dismissal of Collins's second amended complaint is affirmed.

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that do not, and Collins has provided no authority for that position. To the contrary, the privilege in *Ledvina* applies to "putative crime victims," not only those proven to be crime victims after a trial. 213 Ariz. 569, ¶ 14. Indeed, "[t]he law does not, and should not, allow recovery in tort by all persons accused of crimes and not convicted." *Id.* ¶ 13 (quoting *McGranahan v. Dahar*, 408 A.2d 121, 128 (N.H. 1979)).